

RENDERED: APRIL 14, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001622-WC

BLUEGRASS COOPERAGE

APPELLANT/CROSS-APPELLEE

PETITION AND CROSS-PETITION FOR REVIEW OF A DECISION
V. OF THE WORKERS' COMPENSATION BOARD
CLAIM NOS. 1998-WC-85673 AND 2003-WC-01462

MIKE JOHNSON

APPELLEE/CROSS-APPELLANT

AND

HONORABLE LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** **

BEFORE: BARBER, DYCHE, AND MINTON, JUDGES.

MINTON, JUDGE: Bluegrass Cooperage petitions for review of an opinion of the Worker's Compensation Board that reversed an administrative law judge's (ALJ) decision to dismiss Mike Johnson's claim for benefits for a cumulative trauma injury to his right elbow. In addition, Johnson has filed a cross-

petition from the portion of the Board's decision which affirmed the ALJ's decision to dismiss Johnson's claim for benefits for a cumulative trauma injury to his left elbow. We affirm the Board's opinion in all respects.

The record of this case is lengthy and complex. For purposes of resolving these petitions for review, however, we need only to consider the following basic facts. In May 2001, Johnson filed a claim for benefits for alleged cumulative trauma injuries to both elbows; and, in July 2003, Johnson filed another, separate claim for benefits for a cumulative trauma injury to his left elbow. Each injury allegedly occurred as a result of Johnson's employment as a cooper with Bluegrass Cooperage. Each side marshaled evidence, after which the ALJ found that Johnson "was made aware that he had bilateral work-related elbow injuries on December 18, 1997." So the ALJ dismissed Johnson's claims as having been brought outside of Kentucky Revised Statutes (KRS) 342.185's two-year statute of limitations.

Johnson appealed the ALJ's dismissal of his claims to the Board. In a well-written opinion by Board Member Young, the Board found that they were "unable to locate support in the record for a finding that Johnson's *right* elbow problems began in December of 1997 or that Johnson was made aware of a *right* elbow injury in December of 1997." The Board then noted that

much of the medical evidence supported a finding that Johnson's right elbow injury was first medically documented in February 1998. But because the Board lacked authority to make factual findings, such as Johnson's injury onset date, it vacated the ALJ's decision as to the right elbow and remanded the claim for additional findings consistent with the evidence. That portion of the Board's opinion is the subject of Bluegrass Cooperage's petition for review.

As to Johnson's alleged left elbow cumulative trauma injury, the Board found that there was evidence in the record supporting the ALJ's decision that that injury's onset date was December 18, 1997. So the Board affirmed the ALJ's dismissal of Johnson's 2003 claim for benefits due to the expiration of the statute of limitations. And that portion of the Board's opinion is the subject of Johnson's cross-petition.

It is well-established that this Court's function in workers' compensation cases "is to correct the Board only where the . . . Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice."¹ Furthermore, Johnson, as the claimant, has the

¹ Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-688 (Ky. 1992).

burden of proof and must prove every element of his claim.² Because the ALJ's decision was not in Johnson's favor, the issue on appeal is "whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in [Johnson's] favor."³ In order to be compelling, evidence must be "so overwhelming that no reasonable person would fail to be persuaded by it"⁴

It must also be noted that the ALJ acts as the sole finder of fact in workers' compensation cases, meaning that the ALJ alone "has the authority to determine the quality, character[,] . . . substance[,]"⁵ and weight of the evidence presented, as well as the inferences to be drawn therefrom.⁶ Thus, the ALJ "may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof."⁷ In our limited function as a reviewing court, we may not "substitute [our] judgment" for that of the ALJ, nor can

² Magic Coal Co. v. Fox, 19 S.W.3d 88, 96 (Ky. 2000).

³ Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky.App. 1984).

⁴ Magic Coal Co., 19 S.W.3d at 96.

⁵ Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418, 419 (Ky. 1985).

⁶ Miller v. East Kentucky Beverage/Pepsico., Inc., 951 S.W.2d 329, 331 (Ky. 1997).

⁷ Magic Coal Co., 19 S.W.3d at 96.

we render our own findings or direct the conclusions the ALJ shall make.⁸

In its petition for review, Bluegrass Cooperage repeatedly argues that the evidence supports a finding that Johnson's right elbow injury onset date was in September 1996.⁹ This argument is unavailing, however, because, as stated previously, we are unable to make factual findings. So even if we believed Bluegrass Cooperage's contention, we cannot find that Johnson's injury onset date was September 1996 (or any other date). The only question properly before us is whether any evidence exists to support the ALJ's conclusion that Johnson's right elbow injury's onset date was December 18, 1997. Notably, Bluegrass Cooperage's petition does not contain a citation to anything in the record supporting that onset date, nor have we independently located anything to support that onset date. Thus, the Board correctly concluded that the ALJ erred when he found that Johnson's right elbow injury became manifest on December 18, 1997. Furthermore, as the ALJ is the only entity with the authority to make findings of fact, the Board

⁸ Wolf Creek Collieries, 673 S.W.2d at 736.

⁹ In repetitive injury cases, the injury "becomes manifest for the purpose of notice and limitations with the worker's knowledge of the harmful change and the fact that it is caused by the work." Brummitt v. Southeastern Kentucky Rehabilitation Industries, 156 S.W.3d 276, 279 (Ky. 2005).

properly remanded this issue to the ALJ with instructions to find a new onset date for Johnson's right elbow injury.

Finally, we agree with Bluegrass Cooperage that on remand, the ALJ may well find that the correct injury onset date for Johnson's right elbow trauma was February 1998. If the ALJ does find February 1998 as the onset date, Johnson's 2001 claim for benefits will likely again be dismissed on statute of limitations grounds. But we must reject Bluegrass Cooperage's harmless error argument because it is premised on the ALJ finding that Johnson's right elbow injury onset date is February 1998, a finding that the ALJ has yet to make. Finally, lest this opinion be misconstrued, we are not requiring the ALJ to pick any specific injury onset date. On remand, the ALJ is free to choose whatever onset date is supported by the evidence.

Turning to the cross-petition, the ALJ and the Board both found that Johnson's 2003 claim for a left elbow injury was merely a new recitation of his 2001 claim. The ALJ found that Johnson "was made aware that he had **bilateral** work-related elbow injuries on December 18, 1997." (Emphasis added). The ALJ then concluded that "the evidence [is] insufficient to show the plaintiff's elbow problems referred to in this [2003] claim are any different from the elbow problems referred to in" the 2001 claim.

The Board noted that the evidence was conflicting on whether the 2001 claim and 2003 claim referenced the same left elbow injury but affirmed because the ALJ's decision was supported by substantial evidence. According to the ALJ and the Board, since the 2003 claim was traceable to the same onset date as the 2001 claim, it was untimely filed.

In his cross-petition, Johnson contends that his 2003 left elbow claim references a new injury and was not merely a differently worded rehash of his previous claim. Therefore, Johnson contends that his 2003 claim had a different onset date than his 2001 claim.

As noted by the Board, Dr. Thomas Lehmann's office notes for December 18, 1997, contain a finding that Johnson suffered from "left medial epicondylitis."¹⁰ Johnson argues to us, as he did before the ALJ and the Board, that his 2003 claim represents a claim for recurrent medial epicondylitis, which he contends is a different injury than that referenced in his 2001 claim or in Dr. Lehmann's December 1997 notes. Indeed, Johnson's contention finds some supporting evidence in the record. But the fact that there is conflicting evidence is not

¹⁰ Epicondylitis is "inflammation of an epicondyle or of tissues adjoining the humeral epicondyle[,]" and an epicondyle is "an eminence upon a bone, above its condyle." DORLAND'S POCKET MEDICAL DICTIONARY 247 (23rd ed. 1982).

enough to require reversal on appeal.¹¹ Although reasonable minds could differ as to whether the 2003 claim represents a different injury than that alleged in the 2001 claim, it is undisputed that Dr. Lehmann mentioned a medial epicondylitis injury to Johnson's left elbow in his December 1998 notes. The ALJ could permissibly conclude, therefore, that the injury referenced in Dr. Lehmann's December 1998 notes is the same injury alleged in Johnson's 2003 claim. Thus, the ALJ could have reasonably found that the onset date for Johnson's 2003 claim is December 1998, meaning that Johnson's 2003 claim was untimely. Therefore, as the ALJ's and Board's decisions are supported by substantial evidence, we must affirm.

For the foregoing reasons, the decision of the Worker's Compensation Board is affirmed in all respects; and this matter is remanded to the ALJ for additional findings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT AND CROSS-
APPELLEE:

M. Christopher Davis
Louisville, Kentucky

BRIEF FOR APPELLEE AND CROSS-
APPELLANT MIKE JOHNSON:

Wayne C. Daub
Louisville, Kentucky

¹¹ Whittaker v. Rowland, 998 S.W.2d 479, 482 (Ky. 1999) ("[a]lthough a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal.").